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Office Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES.

SIDNEY I. WAILES

vs.

MARION deK. SMITH,
Comptroller of the Treasury of Maryland.

MOTION TO DISMISS WRIT OF ERROR.

JOHN PRENTISS POE,
Attorney General,
For Defendant In Error.

IN THE

SUPREME COURT OF THE UNITED STATES.

SIDNEY I. WAILES

vs.

MARION deK. SMITH,

Comptroller of the Treasury of Maryland.

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States.

And now comes Marion deK. Smith, Comptroller of the Treasury of Maryland, the defendant in error in this case, and by John Prentiss Poe, Attorney General of Maryland, his attorney in this behalf, respectfully moves that the writ of error in this case be dismissed, and prays leave to file his motion and petition, as follows:

The Petition and Motion of Marion deK. Smith, the defendant in error in the above-entitled case, respectfully shows:

I.

That he is the Comptroller of the Treasury of the State of Maryland, duly elected and qualified, and that he was such Comptroller at the time the petition for mandamus in the above-entitled case was filed by the plaintiff in error in the Circuit Court for Anne Arundel County in the State of Maryland.

II.

That as the defendant in said case, he appeared and answered the petition; that thereupon the cause was duly heard by said Circuit Court for Anne Arundel County and was decided by said Court against the plaintiff in error, and a final order passed by said Court in the due and regular exercise of its jurisdiction, refusing the writ of Mandamus prayed for, and dismissing the petition.

III.

That thereupon the plaintiff in error took an appeal according to the law and practice in the State of Maryland in such cases, to the Court of Appeals of Maryland, and that said appeal was argued before said Court of Appeals at the October term, 1892, and the judgment of the said Circuit Court for Anne Arundel County was unanimously affirmed, with costs; all of which will appear by the Record in this case and by the official report thereof, as contained in the seventy-sixth volume of the Maryland Reports, pages 475-484:

ROBINSON, J., delivered the opinion of the Court.

This case has been very fully argued, and the interests involved are of more than ordinary importance. At the same time, however, it does not seem to us that any great difficulties present themselves in the consideration of the several questions upon which the petitioner's right to a *mandamus* depends. Now, what is this case? By an Act of Congress, approved 5th August, 1861, a direct tax of twenty millions of dollars was levied upon real property, and this tax was apportioned amongst the several States according to representation, as prescribed by the Federal Constitution — the apportionment of this State being $436,823.33. Provision was made for the assessment and collection of this tax against the individual owners of such property, but any State was allowed to assume and pay its quota of said tax; and under this provision the State of Maryland assumed and paid into the Treasury of the United States $371,299.83, being its apportionment, less

fifteen per cent. allowed by the Act for the cost of collection. And thus the tax against the property of her citizens was thereby satisfied and extinguished.

Thirty years afterwards, by an Act of Congress, approved 2nd March, 1891, entitled "An Act to audit and pay to the several States and Territories and the District of Columbia, all moneys collected under the direct tax levied by the Act of 1861," the $371,299.83 thus paid was refunded to the State.

This is an application by the petitioner for a writ of *mandamus* to compel the Comptroller of the State to issue a warrant on the Treasurer for the payment to him of $111,389.94, being thirty per cent. commissions on $371,299.83 paid by the United States to Maryland, and to which he claims to be entitled under the Act of 1878, chapter 224. By this Act he was appointed commissioner with authority to prosecute the settlement of all claims against the United States, and for his services he was allowed *thirty per cent. commissions on all sums recovered by him and paid by the United States into the Treasury of this State.* Among the claims which he was thus authorized to prosecute to a settlement, the petitioner contends, was a claim of the State for the repayment of its quota of the direct tax; and that it was through his efforts and the efforts of agents of other States with whom he was associated, that the Act of 1891 was passed, whereby this tax was refunded to the State. And, this being so, it was the duty of the Comptroller, as soon as the money was paid to the State, to have issued a warrant on the Treasurer for $111,389.94, being the commissions to which the petitioner was entitled, and for the payment of which appropriation had already been made by the Act of 1878. Briefly stated, the Comptroller, in his answer, in the first place, denies that the payment by the State of its quota of the direct tax constituted a claim against the United States within the meaning of the Act of 1878. And he denies also that the refunding Act of 1891 was passed through the efforts of the petitioner, or that he was in any manner instrumental in its passage. And he further denies that at the time the demand was made upon him for the warrant in question there was any appropriation by law, as required by the Constitution, for the payment of the commissions claimed by the petitioner.

The case was heard by the Court below on bill, answers, and proof, and, as thus presented, the question is whether the petitioner is entitled to a writ of *mandamus* as prayed?

Now, it can hardly be necessary to say that a *mandamus* is a mandatory writ, and only lies where the ordinary and usual modes of proceeding and forms of remedy are powerless to afford redress, and where, without its aid, there would be a failure of justice. And even in such cases it only lies to enforce the performance of a strictly *ministerial duty*. And by "ministerial" we mean where one is entrusted with the performance of an absolute and *imperative duty*, the discharge of which requires neither the exercise of official discretion nor judgment. As, for instance, where a specific sum of money is appropriated by law for the payment of certain defined services rendered the State, no one questions that in such a case the payment for such services by the proper officer may be inforced by *mandamus*. Where, however, the duty is one which necessarily requires the exercise of discretion and judgment, it is well settled that a *mandamus* will not lie to control or reverse the decision of one to whom the discharge of such duty is confided. It will not lie because it is his discretion and judgment which are to be exercised, and not the discretion and judgment of the Court. But, whilst this distinction will be found to run through all the cases, there is, it must be admitted, some conflict of opinion, in this country at least, as to what constitutes, strictly speaking, a *ministerial duty* as distinguished from a *discretionary duty*, within the meaning of the rule, and it may not be easy to reconcile the principles which are supposed to govern these decisions. Be that as it may, we take it to be settled by the best considered cases, that where the duty is such as necessarily requires the examination of evidence and the decision of questions of law and fact, such a duty is not ministerial, and not being ministerial, the decision of a public officer to whom the discharge of such duty has been confided cannot be reviewed or reversed in a *mandamus* proceeding. In the leading case of the *United States vs. Seaman*, 17 *Howard*, 230, where the relator, a printer to the United States Senate, applied for a *mandamus* to compel the Superintendent of Public Printing to deliver to him to certain public documents, the printing of which he claimed to be entitled to under an Act of Congress, Mr. Chief Justice TANEY said: "Now, it is evident that this case is not one which the Superintendent had nothing to do but to obey the order of a superior authority. He had inquiries to make before he could execute the authority he possessed. He must examine evidence; that is to say, he

must ascertain in which House the order to print was first passed. And after he had made up his mind upon this fact, it was still necessary to examine into the usages and practice of Congress in marking a communication in their proceedings as a document; and to make up his mind whether separate communications upon the same subject or on different subjects from the same office, when made at different times, were, according to the usages of Congress, described as one document, or different documents, in printing and publishing their proceedings. He was obliged, therefore, to examine evidence and form his judgment before he acted; and, whenever that is to be done, it is not a case for a *mandamus*." And the rule thus laid down was approved and adopted by this Court in *Green vs. Purnell*, 12 *Md.* 329, where it was held that the Comptroller, having the exclusive power under the Constitution of adjusting and settling public accounts, was not a mere ministerial officer, and could not, therefore, be compelled by *mandamus* to perform any act in the discharge of his duties, which involved the exercise of discretion and judgment.

So the question comes to this, was the duty of the Comptroller in passing upon the petitioner's application for a warrant upon the Treasurer simply a ministerial duty, or was it one requiring the exercise of judgment and discretion? And to this, it seems to us, there can be but one answer. The Act of 1878 did not designate or specify the claims which the petitioner was to prosecute to a settlement. His authority was general, and included all claims of the State against the United States, but it can hardly be said that the payment by the State of a tax levied and collected as prescribed by the Federal Constitution constituted in itself a claim on the part of the State for reimbursement of the tax thus paid. And whether the tax was levied or paid under such circumstances as to impose a legal or equitable obligation on the United States to refund it, thereby constituting a claim within the meaning of the Act of 1878, was a question which the Comptroller was obliged to consider and determine. And, besides, assuming it to be a claim covered by the Act, he was further obliged to determine whether the money so paid to the State was recovered by the petitioner; for by the Act of 1878 he was to be allowed commissions upon such sums only as were recovered by him and paid by the United States to the State. And especially was this his

duty in face of the refunding Act of Congress which provided in express terms "that no part of the money hereby appropriated shall be paid out by the Governor of any State or any person to any attorney or agent under any contract for services now existing or heretofore made between the representative of any State or Territory and any attorney or agent." In view of such a provision it could not be held that the mere payment to the State was in itself conclusive evidence that the money had been recovered through the agency of the petitioner.

And, besides, the Constitution of this State provides that no money shall be drawn from the treasury of the State except in accordance with an appropriation by law. Sec. 32, Art. 3. Now, by joint resolution passed 26th January, 1891, the General Assembly accepted the money thus refunded by the United States upon the terms and conditions imposed by the Act of Congress, that is to say, upon the condition that no part of the money thus repaid should be applied by the State to the payments of commissions to any attorney or agent. And, by an Act passed at the same session, the Legislature directed that $202,645.71 of the tax refunded should be applied to the payment of the State debt, and the entire balance to be invested for the benefit of the sinking fund. And whether these Acts were to be construed as repealing the appropriation alleged to have been made by the Act of 1878 for the payment of commissions to the petitioner, and as forbidding the payment of commissions to him, either out of the particular fund thus refunded, or of any money in the treasury, were questions which the defendant was necessarily obliged to consider and determine. And it is no answer to say that these Acts, so far as they attempt to deprive the petitioner of commissions under his contract with the State, were null and void because they are in conflict with the Federal Constitution, which forbids a State passing any law impairing the obligation of contracts. Be that as it may, it cannot be said that the duty of the Comptroller in the premises was an absolute and imperative duty, and, therefore, ministerial, requiring neither the exercise of discretion nor judgment; that he had nothing to do but to ascertain what would be thirty per cent. commissions on $371,299.83, and to draw a warrant on the Treasurer for the payment of such sum to the petitioner. On the contrary, he was obliged to decide delicate and important questions, both of law and fact, and, having decided these

questions, it is well settled that a *mandamus* will not lie to reverse his decision, and to compel him to issue a warrant for the payment of the rejected claim.

And here we might rest our decision, but, in view of the large interests involved in this case, we prefer to rest it on broader grounds, grounds which go to the merits of the petitioner's claim for compensation, and upon which the decision of the Court below was based, and from which this appeal was taken.

Apart, then, from any objection to the mode of procedure itself, it must be conceded that unless the payment by the State of its quota of the direct tax constituted a claim against the United States within the meaning of the Act of 1878, there is no ground on which an application for a *mandamus* can be sustained. Now, this Act is entitled "An Act to repeal chapter two hundred and sixty-two of the Public General Laws of the State of Maryland, of eighteen hundred and seventy-two, and re-enact the same with amendments." There is no question as to the construction and meaning of the Act of 1872. By it the petitioner and Mr. Daniel Clark were appointed commissioners with authority to adjust and settle certain *specified claims* of the State against the United States for expenses incurred in *enrolling*, arming, *subsisting* and *transporting troops* employed in aiding the General Government in the prosecution of the war against the seceding States, and for the payment of which appropriation had been made by Act of Congress, approved 27th July, 1861. Upon these claims upwards of one hundred thousand dollars was paid by the United States to the State, and commissions amounting to thirty thousand dollars were allowed and paid to the petitioner and his associate, Mr. Clark. The argument, however, is that the Acts of 1872 and 1878, relating to the same subject matter, are to be construed together, and, although the authority or agency of the petitioner is not limited by the Act of 1878 to any particular or specified claims, yet the nature and scope of his duties are the same under both Acts; in other words, that he was athorized by the Act of 1878 to prosecute the settlement of such claims only for the payment of which appropriation had already been made by Congress. This seems to us to be rather a narrow construction of an Act, the language of which is plain, explicit and unambiguous, which, according to well settled rules, must be construed according to its natural and legal import and meaning.

And we agree with the petitioner, therefore, that the words "all claims" must be construed as including claims of every kind which the State had against the United States, whether appropriation had or had not been made by Congress for the payment of such claims. And we agree, too, that the language as was used in the statute may be said to include all claims or demands of the State arising under such circumstances as imposed a legal or equitable obligation on the part of the United States for the payment of the same. But, construing the language of the Act in this its widest sense, we do not see on what grounds it can be held to include a supposed claim of the State for the repayment of its quota of the direct tax. One may have a claim for taxes unlawfully levied or erroneously paid. But the direct tax was a constitutional tax levied and collected in the mode prescribed by the Constitution. The payment by the State of its apportionment of said tax was but the discharge of a constitutional obligation, and imposed no duty, therefore, on the part of the Government, legal or equitable, to repay it to the State. But, conceding this to be so, abstractly considered, the argument is that, inasmuch as this tax was not and could not be enforced against the owners of property in the seceding States, this inequality in the burden of taxation in itself imposed a legal or an equitable obligation at least on the part of the United States to refund to such States and to owners of property the tax actually paid by them. Now, in answer to this, it may be said that this tax was levied to furnish revenue to enable the Federal Government to prosecute the war against the Confederate States, and that Congress and the several States and the owners of property by whom the tax was paid, all knew that, owing to the war then pending, it could not be enforced against the owners of property in the Confederate States, except, at least, as against such property as might from time to time come within the lines of the Federal armies. And, besides, the tax was levied and collected thirty years ago, and, after the lapse of such a length of time, it is impossible, in the very nature of things, to restore equality of contribution among the owners of property who paid the tax. By the same Act of Congress an income tax was also levied, and the payment of this tax was never enforced against the citizens of the Confederate States, and yet it has never been supposed that this inequality in the burden of taxation imposed an obligation, legal or equitable, on the part of

the United States to refund to the citizens of the twenty-seven States the tax paid by them. The fact that one tax was levied on real property and the other upon income, in no manner affects the supposed inequality in the burden of taxation. And, although his views were somewhat criticised in the argument, it does seem to us that President CLEVELAND was right in saying in his veto message of the Refunding Act passed by the Fiftieth Congress that it was nothing more or less than a *bald gratuity* on the part of the United States. One thing is certain, neither before the passage of the Act of 1878, nor since, has the Legislature of this State, or the Governor, or any other lawfully authorized authority, ever made a claim or demand of any kind on the Federal Government for the refunding of this tax. If any such claim existed, a claim involving nearly four hundred thousand dollars, it is but fair to presume that an effort of some kind would have been made to enforce it. So, by no fair rule of construction can it be said that this supposed claim of the State is one which the petitioner was authorized under the Act of 1878 to prosecute to a settlement. And here we may add that, even assuming it to be a claim included by the Act, there is no sufficient evidence in the record to show that the passage of the Refunding Act of 1891 was in any manner due to his efforts or influence. On the contrary, the Act itself provides in express terms that no part of the money thereby refunded shall be applied to the payment of any attorney or agent under any contract for service. And we can hardly suppose he was instrumental in the passage of an Act with a proviso, the manifest object of which was to prevent the payment to him of any compensation for services rendered under a contract with the State. There is no ground, then, it seems to us, on which the petitioner's claim to compensation can be supported. And, such being our opinion, it is unnecessary to consider the motion made by the Attorney General to strike out of the record what purports to be evidence, because there was no bill of exceptions taken to the rulings of the Court. In the trial of ordinary actions at law, if one proposes to avail himself of objections to the rulings of the Court he must do so by a bill of exceptions signed and sealed by the Court. A writ of *mandamus*, however, was at common law a prerogative writ issued out of the King's Bench and tried before the King's Bench, and from its decision no appeal would lie. By our Code, either party is entitled to

a jury trial and to an appeal. But if both parties waive a jury trial and the issues are tried before the Court, whether the judgment of the Court can be reviewed on appeal in the absence of a bill of exceptions to the rulings of the Court, is a question we need not now consider.

Judgment Affirmed.

IV.

That by said final decision and judgment of the Court of Appeals of Maryland it was determined *upon the merits* that the plaintiff in error had no claim against the State of Maryland as set forth in the petition for a mandamus, nor against your petitioner as the Comptroller of the Treasury of Maryland, in respect of the matter in controversy.

V.

The defendant in error, your petitioner, further shows that, notwithstanding said final decision against said Sidney I. Wailes upon the merits of said matter in dispute between him and the State of Maryland, the plaintiff in error applied to the General Assembly of Maryland at their January session of 1894, for an appropriation, and the said General Assembly of Maryland thereupon passed the following Act, known as the Act of 1894, chapter 233, approved April 3, 1894, to be found among the published Acts of said Assembly of 1894, page 296:

An Act to appropriate a sum of money to compensate Sidney I. Wailes for services rendered by him in the refund by the United States of the quota of the direct tax levied in pursuance of the Act of Congress, approved August 5th, 1861.

Section 1. Be it enacted by the General Assembly of Maryland, That the Comptroller of the Treasury be and he is hereby directed to draw his warrant or warrants upon the Treasurer for the sum of twenty thousand dollars

in favor of Sidney I. Wailes, in compensation for effective services rendered by him in securing the refund by the United States of the sum of $371,299.93, that being the quota of this State for the direct tax paid by the State of Maryland in pursuance of the Act of Congress, approved August 5th, 1861; provided, however, that the sum of twenty thousand dollars hereby appropriated is paid by the State and received and accepted by the said Sidney I. Wailes upon the express agreement and condition that the same shall be in full payment, discharge and satisfaction of all claims and demands whatsoever of the said Sidney I. Wailes against the State for compensation for services claimed to have been rendered by him under the Act of 1878, chapter 224, in connection with the recovery and payment of the direct tax by the United States under the Act of Congress, approved March 2, 1891.

Sec. 2. And be it enacted, That this Act shall take effect from the date of its passage.

Approved April 3, 1894.

VI.

The defendant in error, your petitioner, further shows that the plaintiff in error, said Sidney I. Wailes, accepted the said Act, and on the 4th day of April, 1894, received from your petitioner the said sum of twenty thousand dollars in full settlement of all his claims against the State of Maryland for compensation for the services claimed to have been rendered by him to said State, as will appear by the following receipts given by him to your petitioner upon the payment of said sum of twenty thousand dollars:

$13,333.33. TREASURY DEPARTMENT, *Comptroller's Office*, *Annapolis, Md., April* 4th, 1894.

Received of the Comptroller his warrant No. 1,239 for thirteen thousand three hundred and thirty-three and thirty-three one-hundredth dollars, in payment of so much on account of a special appropriation by the General Assembly of 1894 in my favor in compensation for effective services rendered by me in securing the refund by the United States of the sum of $371,299.93, that being the quota of this State for the direct tax paid by the State of

Maryland in pursuance of the Act of Congress approved Aug. 5, 1861, as per chap. 233, of 1894.

S. I. WAILES.

$6,666.67.

TREASURY DEPARTMENT,
Comptroller's Office,
Annapolis, Md., April 4th, 1894.

Received of the Comptroller his warrant No. 1,240 for six thousand six hundred and sixty-six and sixty-seven one-hundredth dollars, in payment of balance of a special appropriation by the General Assembly of 1894 in my favor in compensation for effective services rendered by me in securing the refund by the United States of the sum of $371,299.93, that being the quota of this State for the direct tax paid by the State of Maryland in pursuance of the Act of Congress approved Aug. 5, 1861, as per chap. 233, of 1894.

S. I. WAILES.

VII.

Your petitioner, therefore, charges that the above entitled case has been deliberately, fully and finally settled by the payment by the State of Maryland to said Sidney I. Wailes, the plaintiff in error, and the receipt by him of said sum of twenty thousand dollars in full payment, discharge and satisfaction of all claims and demands whatsoever by him as in said cause set out, and that the prosecution by him of the writ of error in this case is a manifest breach of good faith and in direct disregard of the express terms and provisions of said Act of Assembly.

VIII.

The defendant in error, your petitioner, therefore, respectfully move your Honors upon the facts hereinbefore stated, all of which are matters of record, that the said writ of error be dismissed with costs. And as in duty, etc.

(Signed) Marion deK. Smith
Comptroller of the
Treasury of Maryland

John Prentiss Poe
Attorney General of Maryland
for Marion deK. Smith, Comptroller, Defdt. in error

STATE OF MARYLAND, ANNE ARUNDEL COUNTY, *To wit:*

I hereby certify that on this 31st day of January 1895, before the subscriber, a Notary Public, duly commissioned and qualified, and residing in said County, personally appeared Marion deK. Smith, Comptroller of the Treasury of the State of Maryland, and made oath in due form of law that the matters and things stated in the aforegoing petition and motion are true. .

In testimony whereof I have hereto set my hand and affixed my Notarial Seal this day and year first written

Jno. Randall Magruder
Notary Public.

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Supreme Court of the United States.

OCTOBER TERM, 1894.

SIDNEY I. WAILES

vs.

MARION DE K. SMITH, COMPTROLLER OF MARYLAND.

The Answer and Demurrer of the Plaintiff in Error to the Motion of the Defendant in Error to Dismiss the Writ of Error.

JOHN T. MORGAN,
Attorney for Plaintiff in Error.

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1894.

SIDNEY I. WAILES

vs.

MARION De K. SMITH, Comptroller of Maryland.

The Answer and Demurrer of the Plaintiff in Error to the Motion of the Defendant in Error to Dismiss the Writ of Error.

Sidney I. Wailes, the plaintiff in error in the above-stated case, comes by his attorney, John T. Morgan, and for answer to the motion served on the said attorney, now submitted to the Court, says that there is no sufficient ground to justify or require the dismissal of the writ of error set forth in said motion, and assigns as grounds of objection thereto the following:

1st. That the record of the proceedings in said cause, which was removed into this Court by the writ of error, is not made a part of the petition and motion of the defendant in error for the dismissal of the said writ of error.

2d. For that the petitioner's statement in paragraph numbered VIII in his petition and motion says: "The defend-

ant in error, your petitioner, therefore moves your honors, upon the facts hereinbefore stated, all of which are matters of record, that the said writ of error be dismissed with costs."

Whereas it is apparent on the face of the statements and averments in said petition and motion that the alleged facts relating to the payment of the demand of Sidney I. Wailes against the State of Maryland are not matters of record in this case, nor are they matters of record in any legal or judicial proceeding, nor are such alleged facts shown to be of record anywhere or under any law so as to bring the same within the judicial knowledge or cognizance of this honorable Court.

3d. For that the petition and motion to dismiss the writ of error, if it is received, requires the Supreme Court to hear and determine a matter *en pais* that is issuable and is not capable of being determined by the record, but only from evidence *dehors* the record in this cause.

4th. For that there is no judgment in the record in this case in favor of the plaintiff in error upon which a judgment of satisfaction could be entered, either in this Court or in any court of Maryland.

The claim or demand of the plaintiff in error, which was the basis of the action in the suit instituted in the circuit court for Anne Arundel county, in Maryland, was determined adversely to the plaintiff in that suit, and the judgment remains as a conclusive denial of that claim unless and until it is reversed on the writ of error, the dismissal of which is claimed in the petition of the defendant in error. Under this state of facts the Supreme Court has no jurisdiction to hear and determine a plea of the payment and satisfaction of said claim.

If the judgment of the Supreme Court is in affirmance of the judgment of the court of appeals of Maryland in this

case, the plea of payment, satisfaction, or release of said claim could only be heard in answer to a separate suit upon the same cause of action. If said judgment should be reversed, the court in which the suit originated would have full and original jurisdiction to hear and determine the plea of payment, etc., *puis darrein continuance*.

5th. There is no statement or averment in this petition and motion that the plaintiff in error has released the errors in the record and judgment in this cause, and the matters stated in said petition and motion do not create such a release of errors by legal implication.

The petition and motion only sets up the receipt by the plaintiff in error of a sum of money "in full payment and satisfaction of all claims and demands whatsoever by him as in said cause set out."

Construing this in the strongest possible way, a judgment for costs against Wailes would still remain; but the sum paid is less than one-fourth of Wailes' demand, and no receipt on a subsequent appropriation could debar him from claiming the full amount appropriated by a prior valid and binding act of the legislature of Maryland for these same services when they should be thereafter rendered or completed.

After the above-quoted averment in the petition and motion, which suggests a very unequal contest between a sovereign State and its citizen, servant, and creditor that should excite the cautious inquiry of the court, the petition proceeds to remind the court of the bad faith of the plaintiff in error and of the offended sovereignty of Maryland in these words:

"And that the prosecution by him of the writ of error in this case is a manifest breach of good faith and in direct disregard of the express terms and provisions of said act of assembly."

6th. The closing paragraph of the VIIth (7th) section of the petition is not in the least suggestive of a voluntary release of errors by Wailes. His alleged bad faith in the acceptance of less than one-fourth of the sum due him from Maryland "in full payment and satisfaction of all claims and demands whatsoever by him as in said cause set out" and the subsequent "prosecution of the writ of error in this case" is not a delinquency for which this Court would visit upon him, in the nature of a penalty, the refusal to hear the errors assigned on the record or the quashing of the writ issued out of this Court. Bad faith in the prosecution of a writ of error is no proof of its abandonment or release.

But this allegation is not true on the facts stated in the petition or in the record in this cause.

In the Maryland act of April 3, 1894 (petition, p. 11), the State admits that the appropriation of $20,000 to Sidney I. Wailes was "in compensation for effective services rendered by him in securing the refund by the United States of the sum of $371,299.93, that being the quota of this State for the direct tax paid by the State of Maryland in pursuance of the act of Congress approved August 5, 1861."

This was after Wailes' demand of a treasury warrant for a prior appropriation, for the same services had been refused by the Maryland court of appeals.

By an act of the Maryland legislature approved April 1, 1878, in which he was appointed commissioner of Maryland and, in its terms, was "authorized to prosecute the settlement of all claims of the State against the United States," which act is in part set out in the record of this cause (see section first of Wailes' petition for mandamus), said Sidney I. Wailes was to be compensated for his services, past and future, under the following provision of said act:

"And he is hereby allowed a commission of 30 per cent. upon any sum that shall be recovered by him and paid by the Government of the United States into the treasury of

Maryland in full compensation for his services and expenses incurred or to be incurred in the prosecution of the same."

The third section of that act further provides as follows:

"That the comptroller of the treasury shall be, and is hereby, authorized and directed to pay to the said S. I. Wailes a commission of 30 per cent. on such sum as shall be recovered by him and paid by the Government of the United States into the treasury of said State upon said claims, and that the said commission shall be payable upon the several amounts received on said claims as they are paid into the treasury."

The sum paid by the United States to Maryland under the act of Congress approved March 2, 1891, was $371,299.33.

This is the identical claim that Wailes was commissioned by Maryland to collect under the act of April 1, 1878, and his services in collecting that claim are admitted in the act of the Maryland legislature that is set out on pages 10 and 11 of the motion and petition in this proceeding.

The act of Congress of March 2, 1891, provided "that no part of the money hereby appropriated shall be paid out by the governor of any State or any other person to any attorney or agent under any contract for services now existing or heretofore made between the representative of any State or Territory and any attorney or agent."

Maryland accordingly received the whole sum into her treasury and appropriated the same to other purposes, leaving Wailes to depend for his commissions and expenses upon the appropriation and the requirement made upon the comptroller of the treasury of Maryland in the act of April 1, 1878, from which extracts are above copied in this answer.

The act of Maryland by which this money was so received was approved January 26, 1892, and is set out in the record of this case as an exhibit to the answer of said comptroller to the petition of Wailes for a writ of mandamus,

and the act of said State approved March 15, 1892, by which all the money received from the United States under the act of Congress of March 2, 1891, was appropriated, is set forth as an exhibit to the supplemental answer of said comptroller to the said petition of Sidney I. Wailes for mandamus.

Thus the record in this case and the said petition show the act of Congress and the acts of the Maryland legislature under which the claim of said Wailes became obligatory upon Maryland, and the amount thereof was ascertained and fixed by law and the appropriation was made to pay the same by the legislature of Maryland and the mandate was made upon the comptroller of the treasury of Maryland to issue his treasury warrant for the same to Commissioner Wailes when the money should be paid by the United States into the treasury of Maryland.

It is difficult to conceive of an appropriation of a prospective character, payable upon a future event, that could be attended with greater certainty in every detail, or that could vest in an officer of the State a more exact and perfect right.

Wailes was not attempting by his petition for mandamus to collect a claim or a disputable demand against Maryland, but to have enforced against an officer of the State a statute of Maryland that was binding on him conclusively and was an irrevocable appropriation to pay a demand created by statute and conferred upon Wailes a right that was vested and could not be repealed.

Maryland has not attempted to repeal the act of April 1, 1878. On the contrary, that act is affirmed, as to every essential feature of it, by the act of April 5, 1894, so far as it touches the duty and obligation of the State and the faithful compliance on the part of Commissioner Wailes with every duty enjoined upon him.

He is left "without the smell of smoke upon his garments."

The act of April 5, 1894, set out in the petition, was an attempt merely to repudiate an honest debt due by statute to a faithful officer.

In view of these facts, it is respectfully submitted to this honorable Court that if there is to be entertained here an inquiry (which must be original in its nature) whether a release of errors has been made by implication growing out of the conduct of Wailes, is it not also a very high duty of the Court to determine whether these parties are on equal terms in their dealings with this subject?

The power of a sovereign State, in dealing with its own citizen who claims to be its creditor is almost absolute, and it includes always the right of the State to refuse to the creditor access to its courts for redress, or, even after the courts, State or Federal, have given judgment against a State it may refuse to unlock its treasury to the demand, and process of execution cannot issue from any court against the State.

A creditor, therefore, has no power to demand full justice, according to law, against a State, and must accept from it as an act of grace what is given to him in satisfaction of his demand.

This was the relation that existed between the State of Maryland and Commissioner Wailes, and Maryland took advantage of it. If Wailes, in terms, consented to this spoliation he did not consent with that free mind and voluntary act that a court of justice can approve.

The State in all its obligations of duty to its citizens is the trustee of the greatest and most delicate powers. The citizen is in almost every sense the ward and the State is the guardian. No trustee can lawfully make profits to himself in dealing with the *cestui que trust.*, and no receipt, acquittance, or release will save the trustee from a full payment of what is acknowledged to be due to the *cestui que trust.*

If a sovereign State can rise above such responsibilities, it does not follow that the courts must declare that the repudi-

ation of a debt by the State is its payment, or that the extortion of a receipt in full from its creditor when only one-fifth of the debt is paid will be a release of errors by implication on a record where error is assigned and may exist.

7th. The receipts of Wailes of the 4th and 14th April, 1894, if they are genuine, are not "in full payment, discharge, and satisfaction of all claims and demands whatsoever by him, as in said cause set out," as is averred in said petition and motion. They are only "in payment of the balance of a *special appropriation* by the General Assembly of 1894 in my (Wailes) favor in compensation for effective services rendered by me in securing the refund by the United States of $391,299.93." There had been a previous appropriation of 30 per cent. of that sum by the act of April 1, 1878. Nothing was paid on that appropriation, and it is a valid and subsisting act creating a vested right not repealed by positive law or by implication. Wailes never gave a receipt "*in full payment, discharge, and satisfaction*" even of this special act of appropriation, as its terms required.

The receipt he gave did not follow these terms of the act. He did not submit to be thus robbed of his rights, although his State demanded this of him on penalty of the loss of all the expense he had incurred in its service and all his promised reward for his labor, and the still grosser injustice of being accused in the name of his State of "a manifest breach of good faith and direct disregard of the express terms and provisions of said act of assembly."

His final receipt was for $6,666.67 "in payment of balance of special appropriations by the General Assembly of 1894" without acknowledging "full payment, *discharge*, and satisfaction of all claims and demands whatsoever."

The receipt of Wailes was not for the warrant of the comptroller of the currency which he was "authorized and directed to issue" to the treasurer to pay said "S. I. Wailes a commission of 30 per cent. upon such sum as shall be

recovered by him and paid by the Government of the United States into the treasury of said State upon said claims," under the act of April 1, 1878.

The prayer of Wailes' petition for mandamus is that the comptroller of the treasury of Maryland be commanded to issue his warrant on the treasurer of the State to pay him the amount of 30 per cent. on the amount of money paid into the treasury by the Government of the United States, that commission amounting to $111,389.94, "under the provisions of said act of 1878, chapter 224, and the appropriation thereby made." It was not for a treasury warrant to be issued under a special act of appropriation of 1894.

The dismissal of that petition is the error complained of on this record, thus denying to Wailes his rights under the act of April 1, 1878. That error, if it be such, is not released or cured by the acceptance of a smaller sum included in an act of special appropriation.

If Wailes shall ever recover a judgment in this case, such is the power of Maryland that all redress may be denied him by a refusal of the legislature to appropriate money to pay his demand.

But the act of appropriation of April 1, 1878, stands as conclusive proof of Wailes' rights, and as a full authority to the comptroller of the treasury of Maryland to issue the warrant as required by that act, and as establishing his right to the warrant.

Maryland, by the act of April 1, 1878, placed the comptroller of her treasury in the grasp of the law as to the specific duty enjoined upon him, and gave power to the courts to compel him to perform that duty. Their power to do justice according to law, after their jurisdiction has attached, is not destroyed or interrupted by the refusal of the State to provide the money to make good the warrant. That is a political act which the courts cannot control, but it cannot relieve them from declaring the rights of Wailes under the law or from issuing a mandamus to the officer upon whom

the duty is imposed by law to issue to Wailes the warrant upon the treasury.

And the plaintiff in error, William E. Wailes, submits to the Court this his answer, upon the record in this case, in law and in fact, to the motion and petition of the defendant in error.

JOHN T. MORGAN,
Attorney for Plaintiff in Error.

BRIEF.

The case of Erwin *v.* Lowry, 7 How., 178, was decided on a principle that disposes of this motion, even if a judgment for an ascertained sum had been rendered in this case in favor of Wailes: "We take the rule to be that although a decree in equity (brought up on writ of error) is fully executed at the instance of the successful party he cannot complain of his own voluntary acts if he does perform a condition imposed upon him before he can have the fruit of the decree, although the other party derives a benefit from such performance."

In this case the sovereign, by a legal enactment that is oppressive on its citizen, admits the validity of his demand, cuts down three-fifths of the sum that a previous statute appropriated to the debt, and violates its contract couched in the same statute, and demands of him a receipt in full payment, discharge, and satisfaction of the demand after the courts of the State had denied to him all legal redress.

All this was done *at the instance of the successful party* that had the power and still has the power to refuse payment of the debt, and now seeks to defeat the power of this Honorable Court to review and redress the wrong done by Maryland to a citizen of the United States.

This act of 1894 was not a benevolence or gratuity to Wailes. It was an exercise of sovereign power over him to compel the extinguishment of a debt that only this Court could aid him in collecting through its supervisory power over the State courts. The intention was to confiscate three-fifths of the debt due from Maryland to Wailes and to make that act final by forcing upon him a release of errors by implication on pain of getting no part of the sum due him if he refused to accept what was offered in full payment, satisfaction, and discharge of his entire debt.

However Wailes may have been compelled by his necessities to accept such tyrannical terms from a sovereign State, that State, having contrived this snare for his feet, cannot have any advantage from his acquiescence, through the judgment of a court of justice.

2. The second point in the case of Erwin *vs.* Lowry is thus stated by the court: "If the judgment is reversed it is the duty of the inferior court to restore the parties to their rights."

The acceptance of the money by Wailes, under the act of special appropriation of 1894, could not have a greater effect than to discharge the debt of Maryland to him. Whether that was the effect of the transaction under all the circumstances is a matter for a jury trial, it being a matter *en pais* and not of record, and if the case is reversed in this Court that issue can only be tried in the inferior court.

3. This cause, in every phase of it, should be tried upon the record that is brought into the Supreme Court by the writ of error. No action of any court in Maryland, subsequent or supplemental to the judgment of the court of appeals, dismissing the petition of Wailes for a writ of mandamus, has been brought into the Supreme Court of the United States in any form. There is no such judgment or order in this cause in any court of Maryland, and there is no such certificate by any clerk.

Crandall *vs.* Nevada, 5 Wall., 663.

Affidavits, even where they are found in the record, are not a part of the record in the Supreme Court unless they are made such by a stipulation between the parties. (England *vs.* Gebhardt, 112 U. S., 502; Pomeroy *vs.* Bank, &c., 1 Wall., 592; see 110 U. S., 174, and 20 How., 427.)

The act of the Maryland legislature of 1894 and the two receipts of Wailes, set out in the petition, are not a part of

any record in this case, and yet they are the real basis of the motion to dismiss the writ of error.

4. No question is made in this petition and motion that the judgment of the court of appeals of Maryland brought here for review by the writ of error does not include a Federal question.

If the Court should find such an inquiry necessary, the plaintiff in error submits the following statement of points and authorities on that subject:

(*a.*) The right claimed by Wailes in his original petition for mandamus was denied in consequence of the construction given by the Maryland court of appeals to the act of Congress of March 2, 1891.

(*b.*) The circuit court of Anne Arundel county (jury trial being waived) in its written opinion held that Maryland had no "claim" against the United States of any kind for a refund of the taxes paid, *in solido*, by that State under the act of Congress approved August 5, 1861, and acts amendatory thereof; that President Cleveland was right in saying in his veto message on a previous refunding act "that it was nothing more nor less than a bald gratuity on the part of the United States."

Congress has power to enact laws and to declare what rights or demands against the United States are lawful claims and that they shall be paid to the persons or States declared to be entitled to the same.

This is even a higher power than any court possesses to ascertain, establish, and enforce a claim or demand or right or debt against the United States in favor of a citizen. The jurisdiction of the courts does not extend to such demands, either in behalf of States or citizens, as against the United States. In respect of all such claims, demands, and rights Congress alone can admit or create or establish or define

any liability of the United States in favor of a State or a citizen as against the United States.

When such a declaration is made by Congress in respect of a liability of the United States to pay money to a State and an appropriation is made to pay the same, the courts, at least, are bound to accept the law so declared as the rule and limit of their action. It is a law which they cannot disobey.

(*c.*) The act of March 2, 1891, is a distinct and unquestionable declaration of law that the United States is liable to certain States and the District of Columbia in a money demand, for which the full sum is appropriated, in consequence of the tax levy made and in part collected under the previous acts of Congress therein mentioned.

The word "claim," several times used in that law, defines the nature of the rights that it accords and confirms. These claims existed in right and justice, but were not recognized by law before the passage of the act of March 2, 1891. They could only be recognized by Congress, and the right of petition made it legitimate to have these claims submitted to Congress in a proper manner upon the facts that could be honestly presented in the prosecution of this public right and purpose.

(*d.*) Mr. Wailes was made the commissioner of Maryland—an honorable office—to "prosecute their settlement" before any department of the Government of the United States. He was sole commissioner for that purpose, and no one else could have represented Maryland in that public employment.

The restriction in section 3 of that act (March 2, 1891) could not and did not repeal or affect the act of the Maryland legislature of April 1, 1878, and the right of Wailes to his warrant upon the treasurer of Maryland and to compensation for his services and expenses in the prosecution

of the claim was not in the least affected by that act of Congress.

5. Yet both the Maryland courts held that this act of Congress operated to deny to Wailes and to deprive him of all right to compensation for his care, labor, assiduity, faithful service, and expenses incurred in the execution of the law of Maryland of April 1, 1878.

This is an interpretation of an act of Congress so as to deny to Wailes his rightful compensation for his work and it violates Wailes' contract with the State of Maryland.

This case is, therefore, one that arises both under the law and the Constitution of the United States.

Starin *vs.* New York, 115 U. S., 248.
Carondelet *vs.* St. Louis, 1 Black, 179.
Id., 195.
Mitchel *vs.* Clark, 110 U. S., 633.
Brown *vs.* Grant, 116 U. S., 207.

6. The *proviso* to the act of 1894, pleaded in defendant's petition, is *unconstitutional*, because it impairs, inasmuch as it destroys, the contract and its obligations between the State of Maryland and the plaintiff in error made under the State law, ch. 224, Acts of 1878.

The case of Fisk *vs.* Jefferson Police Jury, in 116 U. S., 131, is almost in its facts, and certainly in its principles, identical with the case at bar. In that case it was held that—

"After the services have been rendered under a law * * * which fixes the rate of compensation, there arises an implied contract to pay for the services at that rate. The contract is a completed contract, its obligation is perfect," and the court carried the principle to the farthest possible limit, holding that "a change in a *State constitution* which takes away the existing powers of *taxation* so as to deprive the officer of the means of collecting his compensation is within

(15,654.)

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1894.

No. 770.

LEWIS C. STATLER, PLAINTIFF IN ERROR,

vs.

THE UNITED STATES.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF PENNSYLVANIA.

FILED AUGUST 4, 1894.

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., JANUARY 30, 1895.

1 Among the rolls, records, and judicial proceedings had in the district court of the United States for the western district of Pennsylvania, at No. 12, May term, 1894, may be found the following words and figures, viz:

Docket Entries.

UNITED STATES
vs.
LEWIS C. STATLER. } No. 12, May Term, 1894.

Hall, T. B. Alcorn, Blair.

[On margin:] Witnesses, U. S.: Cornelius J. Nagle, Matthew F. Griffin, Daniel McSweeney, Mary A. Smith, J. N. Tillard, M. A. Smith.

Def't: Louis C. Statler, E. M. Ike, John Orr, T. D. Hughes, T. A. Musser.

Indictment: 1st, having in possession counterfeit coin; 2d, attempting to pass same; 3d, passing same. May 8th, 1894, a true bill. May 12, 1894, on precipe filed, subpœna issued. May 14, 1894, the defendant pleads as follows: "And now, May 14, 1894, the defendant admits having in his possession the coin set forth in the indictment and knowing they were counterfeit, but pleads not guilty of the intention of passing or intending to pass the same or to defraud any person with the same." The U. S. attorney, simil-ter, &c., issue. And a jury, being called, came, viz., Ebert Jones, Jacob Strauss, Fred. I. Wheelock, Wm. H. Kracht, Joseph K. Ritenour, John F. Lowry, Geo. A. Chalfant, John H. Evans, Charles L. Lewis, J. G. Stone, Fred. A. Coolbaugh, and W. H. Bailey, twelve good and lawful men of the western district of Pennsylvania, who, having been duly summoned, returned, and empaneled, were sworn to try the issue herein joined. May 15, 1894, the jury on their oaths aforesaid respectively do say that they find the defendant guilty in the first count, for having in possession counterfeit
2 minor coin, and not guilty on the second and third counts of the indictment; and so they all say. Same day, U. S. attorney's certificate of discharge of U. S. witnesses filed. May 16, 1894, by leave of court, motion for arrest of judgment, stay of sentence, and discharge of defendant filed. May 23, 1894, argument on said motion. *C. a. v.* May 24, 1894, subpœna filed. July 2d, 1894, opinion denying said motion filed. July 14, 1894, the U. S. attorney moves for judgment, whereupon "the sentence of the court is that you pay a fine to the United States of five dollars; that you be imprisoned in the Western penitentiary of Pennsylvania, situate in Allegheny city, Pa., for and during the term of thirteen calendar months, and be subject to the same discipline and treatment as convicts sentenced by the courts of the State, and while so confined therein you shall be exclusively under the control of the officers having charge of the said penitentiary; that you pay the costs of this prosecution and stand committed until this sentence be complied with." Same day, commitment issued. Same

day, petition of defendant for writ of error, assignments of error, and bond surwrit of error filed and order made approving bond and allowing writ. Same day, writ of error, citation, and supersed-as granted. Same day, U. S. attorney accepts service of citation and notice given U. S. marshal of supersed-as. Same day, U. S. marshal returns said commitment with endorsement that, a supersed-as having been granted, the prisoner was released, and same filed.

3 Sec. 5458.

In the District Court of the United States for the Western District of Pennsylvania, of May Sessions, A. D. 1894. No. —.

WESTERN DISTRICT OF PENNSYLVANIA, *ss:*

The grand inquest of the United States of America, now inquiring in and for the western district of Pennsylvania, upon their oaths and solemn affirmations respectively do present that Lewis C. Statler, late of said district, yeoman, on the twelfth day of February, in the year of our Lord one thousand eight hundred and ninety —, at the county of Blair, in the district aforesaid, and within the jurisdiction of this court, did, with intent to defraud certain persons to this grand inquest unknown, have in his possession three false, forged, and counterfeited five-cent coins made in the resemblance and similitude of certain minor coinage which has been and hereafter may be coined and stamped at the mints and assay offices of the United States, to wit, unlawfully did have, with intent as aforesaid, in his possession three coin in resemblance and similitude of the genuine five-cent nick*le* coin which have been and hereafter may be coined and stamped at the mints and assay offices of the United States, he, the said Lewis C. Statler, then and there well knowing said false, forged, and counterfeited coin so had in his possession for the purpose and with the intent aforesaid to be false, forged, and counterfeited, contrary to the form of the act of Congress in such case made and provided and against the peace and dignity of the said United States.

4 And the inquest aforesaid on their oaths and affirmations aforesaid do further present that the said Lewis C. Statler, late of said district, yeoman, heretofore, to wit, on the twelfth day of February, in the year of our Lord one thousand eight hundred and ninety-four, at the county of Blair, in the district aforesaid, and within the jurisdiction of this court, unlawfully did attempt, with intent to defraud M. F. Griffin and other persons to this grand inquest unknown, to pass, utter, publish, and sell to and upon the said M. F. Griffin and other persons to this grand inquest unknown one false, forged, and counterfeited coin made in the resemblance and similitude of certain minor coinage which has been and hereafter may be coined and stamped at the mints and assay offices of the United States, to wit, in the resemblance and similitude of the genuine five-cent nick*le* coin which has been and hereafter may be coined and stamped at the mints and assay offices of the United States, he, the said Lewis C. Statler, then and there well knowing

the said false, forged, and counterfeited coin which he so attempted to pass, utter, publish, and sell to and upon the said M. F. Griffin and other persons to this grand inquest unknown to be false, forged, and counterfeited, contrary to the form of the act of Congress in such case made and provided and against the peace and dignity of the said United States.

5 And the inquest aforesaid on their oaths and affirmations aforesaid do further present that the said Lewis C. Statler, late of said district, yeoman, heretofore, to wit, on the twelfth day of February, in the year of our Lord one thousand eight hundred and ninety-four, at the county of Blair, in the district aforesaid, and within the jurisdiction of this court, unlawfully did, with intent to defraud M. F. Griffin and other persons to this grand inquest unknown, utter, pass, publish, and sell to and upon the said M. F. Griffin and other persons to this grand inquest unknown one false, forged, and counterfeited coin made in the resemblance and similitude of certain minor coinage which has been and hereafter may be coined and stamped at the mints and assay offices of the United States, he, the said Lewis C. Statler, then and there well knowing the said false, forged, and counterfeited coin which he so passed, uttered, published, and sold to and upon the said M. F. Griffin and other persons to this grand inquest unknown to be false, forged, and counterfeited, contrary to the form of the act of Congress in such case made and provided and against the peace and dignity of the said United States.

HARRY ALVAN HALL,
Attorney for the United States for the Western District of Pennsylvania.

6 And now, May 14, 1894, defendant admits having the coin in his possession set forth in the indictment and knowing they were counterfeit, but pleads not guilty of the intention of passing or intending to pass the same or to defraud any person with the same.

L. C. STATLER.

[Endorsed:] No. 12, May term, 1894, criminal docket. United States district court, western district of Pennsylvania. United States *vs.* Lewis C. Statler. Indictment for having in possession counterfeit minor coin; 2d, attempting to pass same; 3d, passing same. May 8, '94. A true bill. J. T. Clarke, foreman. Filed 8th day of May, 1894. Harry Alvan Hall, U. S. attorney.

Witnesses: M. F. Griffin, Daniel McSweeney, Jno. N. Tillard, D. McSweeney, M. F. Griffin.

Sworn 8 day of May, 1894, by me. J. T. Clarke, foreman.

7 In the District Court of the United States for the Western District of Pennsylvania.

UNITED STATES *vs.* LEWIS C. STATLER. } No. 12, May Term, 1894, Crim. Docket.

1. Ebert Jones.
2. Jacob Strauss.

3. Fred. I. Wheelock.		Wm. H. Kracht.
4. [Alex. N. Hort.*]	D. 1	[J. S. Sherly.*]
5. [William B. Shafer.*]	1 P.	Joseph K. Ritenour.
6. [Jacob Ritter.*]	D. 2	[Thomas Ward*] P. 3.
7. Geo. A. Chalfant.		[John F. Lowry.
John H. Evans.		
8. [H. C. Reynolds.*]		Charles L. Lewis.
9. [Thomas J. Hawkins.*]	2 P.	J. S. Sherley*] D. 3.
10. J. G. Stone.		
11. Fred. A. Coolbaugh.		
12. W. H. Bailey.		

8 *Witnesses.*

U. S.	Defence.
Cornelius J. Nagle.	[W. H. Bailey.*]
Matthew F. Griffin.	Louis C. Statler.
Daniel McSweeny.	E. M. Ike.
Mary A. Smith.	John Orr.
J. N. Tillard.	T. D. Hughes.
M. A. Smith.	F. A. Musser.

[Endorsed:] No. 12, May term, 1894 (crim. docket). United States district court, western district of Pennsylvania. United States *vs.* Lewis C. Statler. List of jurors. Filed May 14, 1894.

9 In the District Court of the United States for the Western District of Pennsylvania.

U. S. *vs.* Lewis C. Statler. } No. 12, May Term, 1894.

The jury finds the defendant guilty in the first count for having in possession counterfeit minor coin.

Not guilty as to second and third counts.

Pittsburgh, May 14th, 1894.

EBERT JONES, *Foreman.*
W. H. KRACHT.
J. K. RITENOUR.
C. L. LEWIS.
F. H. COOLBAUGH.
JOHN H. EVANS.
J. H. LOWRY.
I. G. STONE.
FRED. I. WHEELOCK.
W. H. BAILY.
JACOB STRAUSS.
GEO. A. CHALFANT.

[* Names in brackets erased in copy.]

10 [Endorsed:] No. 12, May term, 1894, criminal docket. United States district court, west. dist. of Pa. United States *vs.* Lewis C. Statler. Verdict. Filed May 15, 1894.

11 In the District Court of the United States for the Western District of Pennsylvania.

UNITED STATES *vs.* LEWIS C. STATLER. } No. 12, May Term, 1894. Indictment: Having in Possession C'f't Coin, with Intent to Defraud, &c.

And now, May 16th, 1894, defendant, by his attorney, moves the court for stay of sentence, for arrest of judgment, and for the discharge of defendant in the above case, for the following reasons, to wit:

1st. The jury has not found the defendant guilty of any offense under the law.

2d. The verdict, to wit, "the jury finds the defendant guilty in the first count for having in possession counterfeit minor coin, not guilty as to the second and third counts," clearly indicates that the jury did not intend to find the defendant guilty under the act of Congress of intending to defraud any person.

THOS. B. ALCORN,
Att'y for Defendant.

May 16th, 1894.

12 [Endorsed:] No. 12, May term, 1894 (criminal docket). United States district court, western district of Pennsylvania. United States *vs.* Lewis C. Statler. Motion for arrest of judgment, stay of sentence, and discharge of defendant. Filed May 16, 1894. Thos. B. Alcorn.

13 In the District Court of the United States for the Western District of Pennsylvania.

U. S. *v.* LEWIS C. STATLER. } No. 12, May Term, 1894, Crim. Docket.

And now, May 16, 1894, upon motion of T. B. Alcorn, attorney for defendant, it is ordered and decreed that the defendant be released from the county jail of Blair county, Pennsylvania, in so far as he is there detained by the United States.

BY THE COURT.

14 [Endorsed:] No. 12, May T., 1894 (criminal docket). United States district court, western district of Pennsylvania. United States *vs.* Lewis C. Statler. Order of court for the release of defendant from the Blair county jail. Filed May 16, 1894.

15 In the United States District Court for the Western District of Pennsylvania.

UNITED STATES
vs.
LEWIS C. STATLER. } No. 12, May Term, 1894.

BUFFINGTON, *J.*:

On May 8th, 1894, the grand jury of this district returned a true bill against Lewis C. Statler on an indictment containing three counts. As endorsed thereon the several counts were: "For having in possession counterfeit minor coin:" 2nd, "attempting to pass the same," and, 3rd, "passing the same." The indictment was drawn under R. S. 5458, which provides: "Every person who falsely makes * * * any coin in the resemblance or similitude of any of the minor coinage * * * or has in his possession any such false, forged, or counterfeit coin, with intent to defraud any person whatsoever, shall be punished," etc.

To this indictment the defendant pleaded by endorsement thereon and signed by himself as follows:

"And now, May 4th, 1894, defendant admits having the coin in possession set forth in the indictment and knowing they were counterfeit, but pleads not guilty of the intention of passing or intending to pass the same or to defraud any person with the same.

(Signed) L. C. STATLER."

The statute in question, so far as the first count goes, has three elements: the minor coin must be counterfeit, the defendant must have them in possession, and, lastly, such possession must be with intent to defraud. The two first elements, the counterfeit
16 character of the coin and possession by defendant, were admitted, and, indeed, the further fact that defendant knew they were counterfeit. The sole element in dispute was "the intent to defraud," and as to this the defendant specifically pleaded not guilty.

On the trial it was admitted by counsel for the Government no conviction could be had on the second and third counts. The evidence was that defendant had agreed with the secret service officer to sell him counterfeit silver dollars and nickels at fifty cents on the dollar; that he had also furnished a counterfeit silver dollar as a sample.

One W. H. Smith, who pleaded guilty to counterfeiting at the same time, testified to making counterfeit silver dollars at defendant's house and that defendant assisted him in the work. At the time of defendant's arrest at his house in Altoona three counterfeit nickels were found on his person, and about the house a counterfeit silver dollar, acids, solutions, a quarter-dollar mould, a number of tissue papers bearing the circular impress of coin and which were shown to be of the kind placed between counterfeit coins to prevent

abrasion. A number of counterfeit silver dollars with the fragments of broken moulds were carried from the house on the morning of his arrest by defendant's wife. In defence the defendant testified he knew Smith was making counterfeit money at his house; denied taking any part in it himself; that he did not know Smith's character when he came, and that he tried to get him away as soon as he discovered his character. He admitted having offered to sell counterfeit coin, but said he had no intention of doing so and it was only done to fool those inquiring. He also called witnesses as to character. The case was fully argued by counsel, and in an oral
17 charge the jury were instructed to render a verdict of not guilty on the second and third counts; that the issue was wholly upon the first count. Their attention was specially called to the elements going to make up the crime; that defendant admitted by his plea on the indictment knowledge that the coins were counterfeit and that he had them in possession; that the question for them to determine was whether this possession was "with intent to defraud;" that unless they found such intent to defraud they should acquit, but if they found such intent they should convict on the first count. The jury having reached a verdict sealed it and the next day returned it to court in the following form:

"The jury finds the defendant guilty in the first count for having in possession counterfeit minor coin; not guilty as to second and third count-."

The defendant's counsel subsequently moved for stay of sentence, in arrest of judgment, and for discharge of defendant for the following reasons:

First. The jury has not found the defendant guilty of any offence under the law.

Second. The verdict is in fact and in law a verdict of not guilty.

Third. The verdict, to wit (as above), clearly indicates that the jury did not intend to find the defendant guilty under the act of Congress of intending to defraud any person.

The facts of the case are not such as to call for any doubt as to the propriety of imposing sentence by reason of fear of a miscarriage of justice if the verdict is in such form as to justify it. A careful consideration satisfies us the reasons assigned are not
18 tenable. Had the defendant entered a simple plea of not guilty there might have been ground for alleging uncertainty in the verdict, but by his plea he admitted having in possession counterfeit minor coin. There was no issue on that point, and to this fact the jury's attention was specially called. To say that the words "we find the defendant guilty in the first count for having in possession counterfeit minor coin" is a special finding of the fact that the defendant was only guilty of having in possession counterfeit minor coin is to assume they disregarded the instructions of the court—their oath to try the issue submitted to them—and that they found by their verdict a fact which defendant admitted over his own signature, and wholly omitted to pass upon the issue of an intent to defraud, which had been argued by counsel before them and which they had been told by the court was the

fact they were to determine in order to find a verdict. Indeed, reflection on the facts and pleadings peculiar to this particular case satisfies us that these words which are claimed to be a special finding of fact are not such in reality, but are mere surplusage, and used by the jury as a means of identification of the particular count. The second and third counts were specially numbered as such on the indictment, and could be sufficiently described by the jury in their finding by number. The other count was not described by number in the endorsement or in the body of the indictment as being "for having in possession counterfeit minor coin." This description the jury adopted as a specification, and, in addition to finding the defendant guilty in the first count (which it was in fact, though not so specified by endorsement), they added the description endorsed on the indictment which they had before them in their deliberations and the exact phraseology of which they followed. It is as though the verdict had been: "The jury find the defendant guilty in the first count, which is for having in
19 possession counterfeit minor coin." By this construction we do no violence to the finding; the verdict is rational and consistent with the issue which the jury were sworn and instructed to decide, nor does it change or supply any fact found or omitted to be found by the jury. Indeed, the power exists in a court to even amend a verdict. Thus in 1 Archbold's Criminal Practice and Pleading, 609, it is said, "Where the alteration is merely to fulfill the evident intention of the jury, the court will in all cases allow it to be effected—Chitty Cr. Law, 645—but will not amend it by supplying facts incompatible with those found by the jury, 2 McCord, 129;" and in 1 Chitty Criminal Law, 646: "It seems to have been laid down that in a capital case a special verdict cannot be amended, * * * and from the whole we may perhaps infer that where the alteration is merely to fulfill the evident intention of the jury the court will in all cases allow it to be effected."

For the reasons stated, we are of opinion the motion must be dismissed and the defendant called for sentence.

20 [Endorsed:] No. 12, May term, 1894, criminal docket. United States district court, western district of Pennsylvania. United States *vs.* Lewis C. Statler. Buffington, J. Opinion denying motion in arrest of judgment. Filed July 2, 1894.

21 In the District Court of the United States for the Western District of Pennsylvania.

THE UNITED STATES *vs.* LEWIS C. STATLER. } No. 12, May Term, 1894, Criminal Docket.

And now, to wit, 14th July, A. D. 1894, the sentence of the court is that you pay a fine to the United States of five dollars; that you be imprisoned in the Western penitentiary of Pennsylvania, situate in Allegheny city, Pa., for and during the term of thirteen calendar

months and be subject to the same discipline and treatment as convicts sentenced by the courts of the State, and while so confined therein you shall be exclusively under the control of the officers having charge of the said penitentiary; that you pay the costs of this prosecution and stand committed until this sentence be complied with.

BY THE COURT.

22 [Endorsed:] No. 12, May term, 1894 (criminal docket). United States district court, western district of Pennsylvania. The United States *vs.* L. C. Statler. Sentence of the court. Filed July 14, 1894.

23 In the District Court of the United States for the Western District of Pennsylvania.

THE UNITED STATES *vs.* LEWIS C. STATLER. } At No. 12, May Term, 1894. Indictment: Having in Possession, Attempting to Pass, and Passing Counterfeit Coin.

On the 8 day of May, 1894, "true bill." On the 14 day of May, 1894, tried. On the 15 day of May, 1894, verdict guilty in the first count for having in possession counterfeit minor coin and not guilty as to second and third counts.

And now, to wit, July 14, 1894, the district attorney moves for judgment; whereupon the sentence of the court is that you pay a fine to the United States of five dollars; that you be imprisoned in the Western penitentiary of Pennsylvania, situate in Allegheny city, Pennsylvania, for and during the term of thirteen calendar months and be subject to the same discipline and treatment as convicts sentenced by the courts of the State, and while so confined therein you shall be exclusively under the control of the officers having charge of the said penitentiary; that you pay the costs of this prosecution and stand committed until this sentence be complied with.

Certified from the record.

Witness my hand and the seal of said court, at Pitts-
[SEAL.] burgh, this 14 day of July, A. D. 1894.

WM. T. LINDSEY, *Clerk.*

24 An appeal having been asked for and a supersed-as granted, the prisoner is hereby released.

JOHN W. WALKER,
U. S. Marshal.

[Endorsed:] No. 12, May term, 1894 (criminal docket). District court of the United States, western district of Pennsylvania. The United States *vs.* Lewis C. Statler. Commitment to Western penitentiary of Pennsylvania. Filed July 14, 1894.

25 In the District Court of the United States for the Western District of Pennsylvania.

UNITED STATES *vs.* LEWIS C. STATLER. } No. 12, May Term, 1894, Criminal Docket.

Petition for Appeal.

To the Honorable Joseph Buffington, judge of said court:

The petition of Lewis C. Statler, defendant, respectfully represents that in the above number and term he was tried in your honorable court upon an indictment charging him with having in his possession minor coin, with intent to defraud, *inter alia*.

That on the fifteenth day of May, 1894, the jury in said case rendered the following verdict, to wit: "The jury finds the defendant guilty in the first count for having in possession counterfeit minor coin; not guilty as to the second and third counts."

That on the 16th day of May, 1894, defendant, by his counsel, moved the court for stay of sentence, arrest of judgment, and for the discharge of defendant, for the reason that the jury did not find the defendant guilty of an offence under the law.

That on the second of July, 1894, your honorable court refused the said motions. Wherefore the said defendant, conceiving himself aggrieved by the judgment of your honorable court entered on July 2d, 1894, in the above case, doth hereby desire a writ of error to the Supreme Court of the United States, and he prays that his writ of error may be allowed, and that a transcript of the record and proceedings and papers upon which judgment was made, duly authenticated, may be sent to the Supreme Court of the United States.

Your petitioner further represents that the writ of error is not taken for the purpose of delay, but because he verily believes that injustice has been done to him.

Sworn to and subscribed this — day of July, 1894.

L. C. STATLER.

26 [Endorsed:] No. 12, May term, 1894 (criminal docket). United States district court, western district of Pennsylvania. United States *vs.* Lewis C. Statler. Petition for a writ of error and allowance. And now, to wit, July 14, 1894, it is ordered that the writ of error be allowed as prayed for in the above case. By the court. Filed July 14, 1894. Alcorn.

27 Writ of error to the Supreme Court of the United States from the district court of the United States for the western district of Pennsylvania.

LEWIS C. STATLER, Plaintiff in Error,
versus
THE UNITED STATES, Defendant in Error. } No. —, October Term, 1894.

Assignments of Error.

In the Matter of the Petition of LEWIS C. STATLER, Appellant.

Afterwards, to wit, on the — day of July, 1894, at the October term, for eighteen hundred and ninety-four, of the Supreme Court of the United States, at the Capitol, in the city of Washington and District of Columbia, comes the said Lewis C. Statler, by Thos. B. Alcorn, his attorney, and says that in the record and proceedings in the above-entitled matter there is manifest error in this, to wit:

1. The court erred in refusing defendant's motion of May 16th, 1894, for stay of sentence, arrest of judgment, and discharge of defendant, in view of the verdict, to wit: "The jury finds the defendant guilty in the first count for having in possession counterfeit minor coin; not guilty as to the second and third counts."

2. The court erred in entering judgment upon the verdict and not discharging defendant.

Wherefore the said Lewis C. Statler prays that the judgment of the said district court of the United States for the western district of Pennsylvania be reversed and said court be ordered to enter an order directing the discharge of the said Lewis C. Statler from custody.

THOS. B. ALCORN,
Attorney for Appellant.

28 [Endorsed:] No. 12, May term, 1894 (criminal docket). United States district court, western district of Pennsylvania. Writ of error to the Supreme Court of the United States. No. —, October term, 1894. Lewis C. Statler, plaintiff in error, *versus* The United States, defendant in error. Assignments of error. Filed July 14, 1894. Thos. B. Alcorn, att'y for pl'ff in error.

29 Know all men by these presents that we, Lewis C. Statler, of Altoona, Blair county, Pennsylvania, as principal, and Mrs. Kate McMahan, widow, of the same place, surety, are held and firmly bound unto the United States of America in the full and just sum of two thousand (2,000) dollars to be paid to the said United States, its certain attorney or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this tenth day of July, in the year of our Lord one thousand eight hundred and ninety-four.

Whereas lately, at a term of the district court of the United States for the western district of Pennsylvania, in a prosecution depending

in said court on the part of the United States against said Lewis C. Statler, charging said Lewis C. Statler with having counterfeit money in possession with intent to defraud, &c., a judgment was rendered against the said Lewis C. Statler, and the said Lewis C. Statler having obtained a writ of error and filed a copy thereof in the clerk's office of the said court to reverse the judgment in the aforesaid suit and a citation directed to the said United States, citing and admonishing it to be and appear at a Supreme Court of the United States, to be holden at Washington, within 30 days from the date thereof:

Now, the condition of the above obligation is such that if the said Lewis C. Statler shall prosecute said appeal to effect and abide the order of the court and answer all damages and costs if he fail to make his plea good, then the above obligation to be void; else to remain in full force and virtue.

LEWIS C. STATLER. [SEAL.]
MRS. KATE McMAHAN. [SEAL.]

Sealed and delivered in presence of—
H. HAWK.
H. PRICE GRAFFINS.

UNITED STATES OF AMERICA, }
Western District of Pennsylvania, } *ss:*

Mrs. Kate McMahan, surety to the within bond, being duly sworn, doth depose and say that she is the owner of real estate situate in Blair county, within the western district of Pennsylvania, worth the sum of three thousand dollars over and above all her just debts and liabilities, and that there are no encumbrances against the same.

MRS. KATE McMAHAN.

Subscribed and sworn to this 10th day of July, 1894.

H. PRICE GRAFFINS,
United States Commissioner.

31 [Endorsed:] No. 12, May term, 1894, criminal docket. United States district court, western district of Penna. United States *v.* Lewis C. Statler. Bond. And now, 14th July, 1894, the within bond approved. By the court. Filed July 14, 1894.

32 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judge of the United States district court for the western district of Pennsylvania, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said United States district court, before you, between the United States and Lewis C. Statler, a manifest error hath happened, to the great damage of the said

Lewis C. Statler, as by his complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court, at Washington, within 30 days from the date hereof, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and custom of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 14 day of July, A. D. 1894.

WM. T. LINDSEY,
Clerk of the District Court of the United States.

Allowed by—
JOS. BUFFINGTON,
Judge of the District Court of the United States for the Western District of Pennsylvania.

33 [Endorsed:] No. 12, May term, 1894 (criminal docket). United States district court, western district of Pennsylvania. United States *vs.* Lewis C. Statler. Writ of error. Filed July 14, 1894. Wm. T. Lindsey, clerk.

34 UNITED STATES OF AMERICA, }
Western District of Pennsylvania, } *set:*

To the United States of America, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within thirty days from the date hereof, pursuant to a writ of error filed in the clerk's office of the district court of the United States for the western district of Pennsylvania, wherein Lewis C. Statler (at No. 12, May term, 1894, of said court, stands indicted for having in possession counterfeit minor coin with intent to defraud) is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Joseph Buffington, judge of the district court of the United States for the western district of Pennsylvania, this *this* 14th day of July, A. D. 1894.

JOS. BUFFINGTON,
U. S. Dist. Judge.

35 [Endorsed:] No. 12, May term, 1894 (criminal docket). United States district court, western dist. of Pennsylvania. United States *vs.* Lewis C. Statler. Citation. I hereby accept service of the within citation July 14, 1894. Samuel B. Griffith, ass't att'y U. S. Filed July 14, 1894.

36 In the District Court of the United States for the Western District of Pennsylvania.

UNITED STATES *vs.* LEWIS C. STATLER. } No. 12, May Term, 1894, Criminal Docket.

Supersedeas.

Whereas the defendant stands indicted in the above court, at the above number and term, of the charge of having minor coin in his possession, with the intention of defrauding;

And whereas, on the 14th day of July, 1894, a writ of error was allowed from this court to the Supreme Court of the United States;

And whereas a citation in case of said writ of error was granted by this court and duly served upon the United States;

And whereas the defendant has been admitted to bail in an amount fixed by the court:

Now be it known that a supersedeas is granted pending such writ of error.

BY THE COURT.

And now, to wit, July 14, 1894, notice given U. S. marshal of the granting of said writ of supersedeas.

WM. T. LINDSEY, *Clerk.*

37 [Endorsed:] No. 12, May term, 1894 (criminal docket). United States district court, western district of Pennsylvania. United States *vs.* Lewis C. Statler. Supersedeas. Filed July 14, 1894.

38 In the District Court of the United States for the Western District of Pennsylvania.

UNITED STATES *vs.* LEWIS C. STATLER. } No. 12, May Term, 1894 (Criminal Docket).

WESTERN DISTRICT OF PENNSYLVANIA, *ss:*

Seal of U. S. District Court, W. D. Pennsylvania.

I, Wm. T. Lindsey, clerk of the district court of the United States for the said district, do hereby certify that the annexed and foregoing pages contain a true and correct copy of the record and proceedings in the above-entitled case so full and entire as the same remain of record and on file in my office.

In testimony whereof I have hereunto signed my name and affixed the seal of the said court, at Pittsburgh, this 30 day of July, A. D. 1894.

WM. T. LINDSEY, *Clerk.*

WESTERN DISTRICT OF PENNSYLVANIA, *ss:*

I, Joseph Buffington, district judge of the United States for said district, do hereby certify that Wm. T. Lindsey, above named, was at the time of making the above certificate and is now clerk of the said court, and that the said certificate made by him is in due form of law.

JOS. BUFFINGTON,
U. S. District Judge.

Pittsburgh, July 30th, 1894.

[Endorsed:] No. 12, May term, 1894 (crim. docket). District court of the United States, western district of Pennsylvania. United States *v.* Lewis C. Statler. Exemplification of the record.

Endorsed on cover: Case No. 15,654. W. Pennsylvania D. C. U. S. Term No., 770. Lewis C. Statler, plaintiff in error, *vs.* The United States. Filed August 4th, 1894.